

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 6628/2015

5 DATE: 28 APRIL 2015

In the matter between:

TRAFFIC MANAGEMENT TECHNOLOGIES Applicant
(PTY) LTD

And

10 **TLOKWE MUNICIPALITY** 1st Respondent

TOTAL CLIENT SERVICES (PTY) LTD 2nd Respondent

J U D G M E N T

15 **RILEY, AJ:**

On 24 April 2015 I heard this application on an urgent basis.
The relief sought by the applicant is in two parts. In terms of
Part A applicants seeks an urgent review:

20

- (1) Declaring first respondent's refusal to consider the
applicant's internal appeal lodged in terms of section
62 of the Local Government Municipal Systems Act 32
of 2000 ("the Systems Act") against the rejection of its
bid for tender 29/2013: A Law Enforcement

25

/RG

/...

Administration Support System and the Lease of Camera Law Enforcement Equipment to be unlawful and invalid;

- 5 (2) Directing the first respondent to provide the applicant, within 5 days of this order, with reasons and the record of the decision to reject its bid, including all bids received for the tender and all correspondence, reports, memoranda, minutes of meetings, documents, evidence, transcripts of recorded proceedings and
10 other information relevant to the decision;
- (3) Directing the first respondent to permit applicant to supplement its internal appeal within 15 days after receiving the documents listed in paragraph 2 above.
- 15 (4) Directing the first respondent to notify the applicant and second respondent of the outcome of the internal appeal process within 2 days after the determination thereof.

In addition to the relief sought herein before, an Order:

20

- (1) Declaring that the Service Level Agreement (“the SLA”) concluded between first respondent and applicant on 23 February 2015 expires on 24 August 2015.
- 25 (2) Declaring the first respondent to be in breach of the

/RG

/...

6628/2015

SLA concluded between the first respondent and applicant by terminating the SLA with effect from 1 May 2015.

- 5 (3) Directing that the applicant is entitled to perform the services required in terms of the tender and be remunerated therefore in terms of the SLA until 24 August 2015.

10 Pending the determination of the internal appeal herein before referred to, or the expiry of the SLA on 24 August 2015, or the final determination of the review instituted in terms of Part B, whichever is the later date –

- 15 (1) Interdicting and restraining the first and second respondents from implementing the decision by the first respondent to award the tender to the second respondent.

- 20 (2) Interdicting and restraining the first and second respondents from implementing any contracts or agreements concluded between the first and second respondents pursuant to the award of the tender.

The applicant, Traffic Management Technologies (Pty) Ltd (“TMT”) is a provider of traffic management services which includes the monitoring, capturing and processing of traffic

/RG

/...

6628/2015

violations on behalf of municipalities. It does so by using front office equipment and back office software. The former refers to hardware such as cameras and other devices used to measure the speed at which vehicles travel and the latter
5 equipment refers to software used to process fines in cooperation with the relevant municipalities and prosecuting authorities. It is common practice that municipalities outsource their traffic management services to a private service provider such as the applicant to enforce traffic laws
10 and to assist the municipality with the processing and capturing of data in order to collect revenue on the basis of the issued fines.

Since there is no evidence on the papers that the background
15 facts as set out by Dr Nomathemba Emily Blaai-Mokgethi (“Mokgethi”) in the first respondent’s answering affidavit is demonstrably and clearly unworthy of credence, I shall for the purposes of the determination of this application accept the factual account of Mokgethi as correct. Accordingly, prior to
20 the applicant providing services to the municipality there had been another service provider, Standing Ovation (Pty) Ltd, which had a contract with the municipality for the provision of these services.

25 The contract between the first respondent and Standing
/RG /...

6628/2015

Ovation was on a month to month basis. Standing Ovation was leasing the systems, to provide the services, from another entity known as Servitas (Pty) Ltd. It then transpired that Servitas sold to the applicant the very same system that

5 Standing Ovation was using to supply the services to the municipality. A dispute arose between applicant and Standing Ovation in terms of which the applicant alleged that Standing Ovation owes it R1 187 294,97. The applicant withdrew the system from Standing Ovation and in fact began the process of

10 liquidating that company as a result of which Standing Ovation could no longer provide the service required by the municipality.

It was suggested that Standing Ovation should cede its

15 contract with the municipality to applicant but this did not come to fruition. I am satisfied that applicant was well aware that the agreement between the municipality and Standing Ovation was on a month to month basis. By 27 August 2014 applicant summarily terminated the system, resulting in the

20 decision by first respondent to enter into a short and fixed term contract with the applicant.

According to Mokgethi the applicant had manipulated its ownership of the system to entrench its position as sole

25 service provider of the services desperately required by the

/RG

/...

first respondent. The first respondent then decided that since applicant has procured the system which contains the data of the municipality and whilst the first respondent is in the process of procuring a service provider for the services, it should enter into a fixed term agreement (i.e. on a six month basis) with applicant for provision the services. It is clear that this was only to be an interim measure and in accordance with the short term procurement requirements applicable to municipalities.

10

According to the appointment letter dated 30 October 2014, the first respondent made an offer to applicant to provide these services for a period of 6 months, commencing on 1 November 2014. I deem it necessary to refer to the essential terms of the letter of appointment headed "Contractual Appointment of TMT Services for Law Enforcement:

15

1. This letter serves to inform you that Tlokwe City Council accepts your services on a contractual appointment not exceeding a period of six months to render back office support for law enforcement...

20

2. Your appointment will be subject to the conditions and specifications stipulated in the contract which will serve as legal document between Tlokwe Council and your company.

25

/RG

/...

3. Note: This letter of appointment is provisional and is based on performance and outputs meeting, the specifications and time-frames stated in the document, failing which the City Council reserves the right to terminate the appointment.
4. Payments will be done strictly according to the Council's Expenditure Management Policy, therefore you are required, if not registered, to register your company on the municipalities' database should you accept the contract.
6. You are hereby requested to commence with this service by 1 November 2014 should you accept the offer and are requested to confirm in writing that you will accept the appointment with the conditions stipulated in this correspondence, which acceptance will constitute an agreement."

It is common cause and not in dispute that the specific terms of the SLA took some time to finalise and was signed off much later after the applicant commenced performing the services as per the appointment letter on 1 November 2014. It is further common cause that the parties had weekly meetings, attended by the applicant and first respondent's representatives, to discuss *inter alia* the implementation of the project, operational requirements and to finalise the terms in SLA.

On 4 February 2015 applicant forwarded a draft service level agreement to the first respondent. It suffices to say that first respondent was concerned about certain of the proposed
5 clauses, namely Clause 1.5; Schedule 4 and Clause 10.4. It is unnecessary to repeat the provisions except to say that the effect thereof according to first respondent was that –

1. First respondent waived its right to rely on the
10 *contra proferentem* rule;
2. The applicant sought to secure a 3 year contract with first respondent, unless first respondent gave notice of termination, in terms of clause 10.4 which applicant must have received, in order for the
15 notice to comply with the contract;
3. The notice period for termination of the contract was extended for a period of two months.

The first respondent carefully considered the draft agreement
20 and it is common cause that it changed the agreement, i.e. the SLA; to give effect to its intention as set out in the letter of appointment so that the agreement between the parties would endure for six months only from 1 November 2014. The draft agreement was specifically amended to include reference to
25 the words, “as per appointment letter”.

Mokgethi states that the SLA signed by the parties in February 2015 must therefore be read together with the October 2014 appointment letter which contemplated that the SLA would be entered into between the parties to record the conditions and specifications (i.e. the nuts and bolts) which regulate the provision of the services by applicant to first respondent. According to her it was never the intention of the first respondent that the agreement was to commence on 23 February 2015 and run until August 2015.

The applicant submitted its bid on 24 October 2014 and was unsuccessful and the second respondent, Total Client Services Limited ("TCS"), was appointed as the preferred service provider.

On 4 February 2015 first respondent informed the applicant by way of a letter which was also sent by telefax that –

20 "...your bid considered in accordance with the Municipal Supply Chain Regulations and applicable laws was unsuccessful.

The municipality further informs you that should you wish to lodge an appeal against its decision, do so with 14 days of receipt of this correspondence as per

/RG

/...

6628/2015

the provisions of the Municipal Finance Management Act 56 of 2003 citing reasons for such appeal.”

On the same day first respondent notified the applicant in writing that –

“Your six months contract obligation with Tlokwe City Council will be ending by 30 April 2015. We further express our gratitude in terms of the service you have rendered to the municipality thus far, hoping to have the same working relationship with you in the future.”

On the evidence it is clear that further correspondence was exchanged between applicant and first respondent and their respective attorneys in relation to certain conduct of first respondent which the applicant averred was in breach of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). First respondent however adopted an intractable stance. Applicant also made several attempts to negotiate a resolution of the dispute between the parties which was unsuccessful and this ultimately forced it to approach this court for relief in this urgent application.

According to the applicant the decision by first respondent to award the tender to second respondent falls to be set aside on /RG /...

the following grounds:

- (1) Section 5 of PAJA requires that reasons for administrative action be given. Despite applicants requests no such reasons have been furnished;
- (2) In terms of section 6(2)(c) the actions of the first respondent were substantially and procedurally unfair.
- (3) The first respondent failed to take into account relevant considerations in terms of section 6(2)(e)(iii) of PAJA and took into consideration irrelevant facts.
- (4) The first respondent also acted arbitrarily or capriciously.
- (5) The decision falls foul of section 6(2)(f)(ii) of PAJA because it was not rationally connected to the purpose for which it was taken, the purpose of the empowering provision calling for the tender and the information before the first respondent and the reasons given by the first respondent.
- (6) The decision by first respondent is a decision which is so unreasonable that no decision maker could have reached the conclusion that the first respondent did on the facts before it and as such falls foul of section 6(2)(h) of PAJA.

In response to applicants' averments that the first /RG /...

6628/2015

respondent's conduct falls foul of the provisions of PAJA the first respondent in answer denied that the decision to award the tender to second respondent is reviewable and liable to be set aside. According to first respondent, the applicant has not
5 set out any particularity and or the basis for challenging the decision, save to repeat the sections of PAJA which it believes are applicable in its challenge. First respondent invited the applicant to provide particularity and substance to its challenge.

10

In reply applicant averred that it had set out the grounds in its founding affidavit sufficiently and that in any event it would only be in a position to file a supplementary founding affidavit and amended notice of motion in terms of Rule 53 once it has
15 received the record.

I agree with Mr Ackerman for the applicant that the issue whether or not applicant had filed its appeal in time or at all is moot as first respondent has made it clear that it is not
20 prepared to provide reasons and that applicant must resort to the provisions of the Promotion of Access to Information Act. He submitted that applicant is entitled to the information requested for the purposes of an internal appeal, that since the appeal process is part of the procurement process and
25 applicants' right to an equitable, transparent, competitive and

/RG

/...

6628/2015

cost effective procurement process in terms of the Constitution and relevant Legislation.

In his view sections 5 and 6 of PAJA require decision makers
5 to give reasons for their decisions, to act fairly, both procedurally, not arbitrarily and or capriciously, not to take decisions which are unreasonable and not to take decisions which are so unreasonable that no reasonable decision maker could have reached the conclusion on the facts. He contended
10 further that applicant's price was more competitive than that of second respondent and if there are other reasons why second respondent, despite being more expensive than applicant was awarded the tender, the first respondent has not provided the reasons despite applicant's request.

15

Accordingly he argued that applicant was entitled to the review relief as set out in Part B of the notice of motion. Mr Ackerman contended further that in terms of the SLA the commencement date of the contract is determined by the
20 commencement date which is the date of final signature, in their words, 23 February 2015. He contended that applicant therefore had a clear right in terms of the SLA to continue to render the service until 24 August 2015.

25 In his view the injury to applicant is real in terms of lost
/RG /...

6628/2015

income and should the relief not be granted, second respondent will soon commence performing works and entrenching its position. He submitted further that applicant has no alternative remedy available to it but to interdict the
5 first respondent.

On a consideration of the papers it seems that the application was initially brought on an urgent basis to:

- 10 (1) expedite applicants' internal appeal;
(2) to obtain reasons and records;
(3) to enforce the SLA in the terms understood and contended by applicant; and
(4) in the interim to interdict the implementation of the
15 decision to award the tender to second respondent, or any implementation of contracts pursuant to that award.

I am satisfied that the first prayer sought by the applicant, together with the fact that the first complaint by the applicant on 11 March 2015 to the municipality was to appeal the decision not to award the tender, was the real basis for the urgent application. In its reply and during argument by Mr Ackerman it is clear that there is no longer mention of the
25 award of the tender being an infringement of the right to a fair

/RG

/...

6628/2015

and equitable procurement process as set out in section 217 of the Constitution.

During argument Mr Ackerman also agreed that the effect of
5 prayer 4 is for final relief, pending the review relief sought in
Part B in terms of Rule 53 the wording “whichever is the later
date” must be accepted to mean that the SLA will have to run
its course and consequently the effect of an order would be for
final relief.

10

The main focus of the relief sought by the applicant is the
enforcement of the SLA. The question that must therefore be
answered is whether the applicant has a contractual right to
remain the incumbent in its current post for 6 months ending
15 24 August 2015 in terms of the SLA.

It is trite law that where the relief prayed for by the applicant
(as is the present matter) in the notice of motion is final in
nature, the applicant has to establish a clear right. Thus the
20 applicant must establish that its contract with the first
respondent will remain in effect until 24 August 2015. It is
further accepted law that a final interdict is one which
unconditionally and permanently prohibits the wrongful conduct
of the respondent. A Court may grant a final interdict in
25 motion proceedings if the facts in issue are not in dispute,
/RG /...

otherwise action must be instituted.

Thus the applicant must prove on a balance of probabilities that it has a clear right, an actual or threatened invasion of its
5 right, and the absence of a suitable remedy.

Mr Manentsa who appeared on behalf of the first respondent contended that:

- 10 (1) the allegation that the service level agreement would commence and run for a period of 6 months is premised on the erroneous and self serving interpretation of the agreement by the applicant;
- (2) that it was clear that the SLA must be read together
15 with the appointment letter and that on a proper interpretation of the SLA the duration of the agreement is from 01/11/2014 to 30/04/2015;
- (3) that the first respondent has not breached the agreement, that the applicant has failed to establish
20 such a clear right and can accordingly not succeed in having the agreement declared to expire in August 2015;
- (4) that in any event the applicant is not left without any recourse. It can have a claim for compensation
25 against the first respondent.

In my view the provisions of the SLA must be interpreted in accordance with the established principles of interpretation. See Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18, Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA), para 12. According to the SCA it is necessary in interpreting an agreement or document to bear in mind that:

10

“whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never clear, has fallen away. Interpretation is no longer a process that occurs in stages but is ‘essentially one unitary exercise.’ It is further clear that the context of the provision under consideration must be determined by both the internal context namely the language, words,

25

/RG

/...

grammar and syntax of both the provision in question
and the document as a whole, and also by the
external context provided by the factual matrix in
which the document finds its setting, which includes
5 both the background and surrounding circumstances.”

Considering the principles outlined by the SCA (including the
the principles laid down in the unreported judgment of Kilburn
Tuning Fork (Pty) Ltd [2015] ZASC53 (delivered on 29 March
10 2015) and applying them to the present matter then it is clear
that:

- (1) The appointment letter must be read together with the
SLA.
- 15 (2) The first respondent only intended the SLA to be in
place for a period of 6 months.
- (3) That it clearly intended to put the services that
applicant was to perform out to tender.
- (4) That its intention was that the applicant commences
20 its services on 01/11/2014 in terms of the appointment
letter.
- (5) That applicant did in fact commence performing its
services on 01/11/2014 and gave effect to what both
parties intended.
- 25 (6) That applicant commenced invoicing the first
/RG /...

6628/2015

respondent in terms of the letter of appointment for services rendered.

(7) That the SLA contained the clauses which were to regulate the conditions and specifications of the services performed by the applicant to first respondent.

(8) That the inclusion of the words in the final SLA which was signed by the applicant “as per appointment letter” makes it clear that the agreement was only of temporary nature and certainly not intended to be extended beyond 30 April 2015.

I pause to mention here that the fact that first respondent had removed what it regarded as the offensive clauses, which was contrary to the letter of appointment and the fact that applicant signed the SLA after the amendments were made by first respondent is further evidence that the parties were in agreement on the terms of the SLA as well as the period of the agreement.

20

It must therefore be so that the SLA and the appointment letter must be interpreted to mean that the agreement between the parties comes to an end on 30 April 2015.

25 Accordingly I am not persuaded that applicant has made out a

/RG

/...

6628/2015

case on a balance of probabilities that it has a clear right based on its assertions that the SLA extends until 24 August 2015. In the result the application falls to be dismissed on this basis.

5

There is a further issue that requires to be dealt with. This relates to whether or not this court has jurisdiction to hear this application.

10 It does not appear to be in dispute that the conduct complained of by the applicant in respect of the first respondent as aforesaid, and which forms the subject matter of the review proceedings, constitute administrative action and that accordingly the provisions of PAJA apply. An important
15 issue to consider is whether or not this Court is in any event justified to hear this matter. In its founding affidavit applicant avers that this Court has jurisdiction by virtue of the fact that in terms of the PAJA and particularly the definition of Court in section 1 of PAJA, the adverse effect of the first respondent's
20 action under review will be experienced in the area of jurisdiction of this Court.

No other ground to found jurisdiction is advanced. Apart from the description of the applicant company, no information is
25 provided about the applicant's domicile. Both Mr Manentsa on /RG /...

6628/2015

behalf of first respondent; and Adv Jacobs (who was assisted by Adv Coetzee), on behalf of the second respondent, contended strongly that this was fatal to applicant's case and that applicant had failed to make out a case that this Court had
5 jurisdiction to entertain this application.

In the present application the second respondent specifically locked horns with the applicant on the issue of jurisdiction and launched a wide range attack on why, in its view, the
10 applicants' application should be dismissed due to lack of jurisdiction.

Apart from denying the averments made by the second respondent that this Court lacks jurisdiction to entertain the
15 application and averring that the issue of jurisdiction is a matter for legal argument, applicant presented no factual response to the averments made by the second respondent (or the first respondent) regarding its lack of jurisdiction.

20 The Superior Courts Act provides that High Courts have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within their respective areas of jurisdiction, and all other matters of which they may, according to law take cognizance.

25

/RG

/...

Section 1 of PAJA defines the term “court” as

‘(a) ...

(b) (i) a High Court or another court of similar
5 status; or

(ii) a Magistrate’s Court either generally or in
respect of a specified class of administrative
actions designated by the Minister by notice in
the Gazette and presided over by magistrate
10 or an additional magistrate designated
in terms of section 9A,

within whose area of jurisdiction the administrative
action occurred or the administrator has his or her or
its principal place of administration or the party whose
15 rights have been affected is domiciled or ordinarily
resident or the adverse effect of the administrative
action was, is or will be experienced.’

In terms of section 6(1) of PAJA any person is entitled to
20 institute proceedings in a court for the judicial review of an
administrative action. Section 6(2) in turn provides that a
court has the power to review an administrative action on a
number of grounds listed in subsection 2 of section 6.

25 In B.O. Mahony N.O. Trustee for the Time Being of Rainbow

Nation Property Trust Number 3 and two others v The Member of the Executive Council for Health and Social Development Eastern Cape Provincial Government and two others, an unreported case of Mayosi, AJ (case number 1444/2015), the learned acting Judge correctly held at para 20 that considerations of convenience are indeed relevant to the question of whether or not a particular division of the High Court has jurisdiction to determine a particular case.

10 In National Arts Council and Another v Minister of Arts and Culture and Another 2006 (1) SA 215 (CC) Yekiso, J held that the question of whether or not this court has jurisdiction must be answered with reference to both The Superior Courts Act, read with the provisions of section 1 and 6 of PAJA. In that
15 case he found that this Court did not have jurisdiction as it was clear from the evidence that the headquarters of the National Council were in Johannesburg and that first applicant's staff were based in Johannesburg. All the indications were that the first applicant's business activities
20 was carried on in Johannesburg and various other factors point to the conclusion that it could not be said that the residence or otherwise of any member of the National Council within the area of jurisdiction of a court was a sufficient connecting factor to establish jurisdiction. Yekiso, J held that it was clear
25 that no decision adversely affecting the rights of anyone of the /RG /...

6628/2015

applicants that had a direct, external legal effect had been taken in Cape Town and found that this Court lacked jurisdiction to hear the applicants' application for urgent relief or for the judicial review of the first respondent's decision.

5

It is accepted law that an applicant in motion proceedings is bound to justify his claims to make his case in his founding affidavit. See Port Nolloth Municipality v Xhalisa and Others 1991 (3) SA 98 CPD at 111. In his heads of argument, and
10 during argument Mr Ackerman contended that there are a number of cases confirming that the definition of Court as defined in PAJA confirms jurisdiction on the Court where the effect of the administrative decision is felt. He placed strong reliance on the judgment of Yekiso, J in Johnson and Others v
15 Minister of Home Affairs; in re; Deloire and Others v Minister of Home Affairs and Another (10310/2014; 10452/2014) [2014] ZAWCHC 101 (30/06/2014). In my view the facts of that case is distinguishable from the present matter. In the instance of the Johnson and Delorie matters the applicants averred that
20 they are all domiciled and ordinarily resident in Rondebosch, Cape Town and were thus in the area of the Court's jurisdiction. In the present matter the applicant failed to make such an averment. The applicants' submissions are accordingly not supported by the record. Its failure to reply to
25 the averments, as contained, in second respondent's /RG /...

answering affidavit, is for the reasons which is outlined hereunder, fatal to its application:

5 (1) The SLA upon which the applicant relies for the relief it seeks provides *inter alia*:

1.1 for services to be rendered by the applicant to the local authority which is defined in the SLA as the Tlokwe Municipality.

10 1.2 the offices of Tlokwe Municipality has its domicile and *domicili citandi et executandi* at corner of Saul Plaaityie Avenue and Wolmarans Street, Potchefstroom,

1.3 the services to be rendered is within the area of the Tlokwe Municipality.

15 (2) The tender process for Tender 29/13, occurred under the auspices and the instance and request of the Tlokwe Municipality.

20 (3) The performance of the applicant's contractual obligations in terms of the SLA are territorially bound by the municipal area of the Tlokwe Municipality. In addition, the receipt of tenders and the adjudication of tenders as well as the allocation of the tender, which the applicant attempts to challenge occurred in the Tlokwe Municipality.

25 (4) The service which applicant is presently obliged to

render is not only to be rendered within the Tlokwe Municipality and the payments which it received pursuant to the SLA, are also made by the Tlokwe Municipality.

5 (5) The applicants staff and infra structure are employed at the offices of the Tlokwe Municipality from where it renders the service.

10 (6) The alleged adverse effects which applicant complains about relates to the fact that it would be precluded from rendering service in the Tlokwe municipal area and to the Tlokwe Municipality beyond 30/04/2015, being the date when the SLA comes to an end.

15 (7) The applicant's review proceedings i.e. the merits and competency of which is disputed by second respondent, is confined to the Tlokwe Municipality and municipal area.

 (8) The applicant's reliance on an internal appeal similarly relates to a tender process and adjudication which occurred in the Tlokwe Municipal area.

20 (9) Second respondent has its head office and principal place of business in Centurion, Pretoria, which falls within the area of jurisdiction of the Gauteng Provincial Division, Pretoria.

25 It is therefore clear that since the respondents have not

6628/2015

waived their rights to raise jurisdiction as a defence and the fact that respondents have not submitted to the jurisdiction of this Court, I cannot find that this Court has jurisdiction to hear the application for urgent relief or for the judicial review of the decisions by the first respondent. See National Arts Council v Minister of Arts and Culture (supra). Accordingly, and in my view, the applicant has in addition, not succeeded in surmounting the jurisdictional hurdle.

10 In the result I make the following order:

THE APPLICATION IS DISMISSED WITH COSTS WHICH SHALL INCLUDE IN THE CASE OF THE SECOND RESPONDENT, COSTS CONSEQUENT UPON THE EMPLOYMENT OF TWO COUNSEL.

20

RILEY, AJ